



the nature of the motion as well as its legal basis. Dealership Plaintiffs did not obtain Defendants' concurrence in the request to file said sur-reply.

Attached hereto as Exhibit 2 is a proposed order prepared for signature by this Court.

Dated: April 13, 2015

Respectfully submitted,

/s/Jonathan Cuneo

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**CONCISE STATEMENT OF ISSUES PRESENTED**

Whether Dealership Plaintiffs may file a sur-reply in response to Certain Defendants' Reply in Support of their Motion for Clarification (Doc No. 929 in Case No. 2:12-md-02311-MOB-MKM) in order to address arguments that Defendants have raised for the first time in their Reply as well as certain misperceptions created by the Reply brief.

### **MOST APPROPRIATE AUTHORITIES**

*Kimble v. Hosokawa*, 439 F.3d 331 (6<sup>th</sup> Cir. 2006) (“[D]istrict courts ordinarily enjoy broad discretion in matters of pretrial management, scheduling, and docket control.”)

*Audi AG v. D’Amato*, No. 04-cv-70665, 2007 WL 313537 (E.D. Mich. January 30, 2007) (allowing sur-reply brief when there is no prejudice and additional briefing will aid in the decisional process)

*Dupree v. Cranbrook Ed. Cmty.*, No. 10-12094, 2012 WL 1060082 (E.D. Mich. March 29, 2012) (granting motion for leave to file a sur-reply to address arguments first raised in a reply brief)

## ARGUMENT

In their Reply in support of their Motion for Clarification (Doc No. 929 in Case No. 2:12-md-02311-MOB-MKM) (“the Reply”) Defendants argued for the first time that they will “show that neither the auto dealers nor the end-payors can satisfy Rule 23 because determining whether an auto dealer or end payor was impacted by defendants’ alleged conduct will require individualized evidence” based on a number of factors and influences, which Defendants argued would not be sufficiently addressed by Dealerships’ document or data productions. *See* Reply, at 2. Defendants argue that on the basis of this showing, they should be permitted six days of depositions for each of the forty-five Dealerships, rather than the “one deposition of a named plaintiff” that this Court described at the most recent Status Conference. *See* Ex. A to Dealership Plaintiffs’ Response to Defendants’ Motion for Clarification, 2:12-md-02311-MOB-MKM, Doc # 916-1, at 24. Defendants also create misperceptions in their Reply about Dealership Plaintiffs’ proposed production, confusing the issue of what Dealership Plaintiffs have agreed to produce. In order to respond to the issue Defendants have raised for the first time and to clarify what Dealerships have agreed to produce, Dealership Plaintiffs respectfully request leave to file the attached sur-reply.

The Court may permit the filing of additional documents in support of, or in opposition to, a motion. *Kimble v. Hosoi*, 439 F.3d 331, 336 (6<sup>th</sup> Cir. 2006) (“[D]istrict courts ordinarily enjoy broad discretion in matters of pretrial management, scheduling, and docket control.”); *Audi AG v. D’Amato*, No. 04-cv-70665, 2007 WL 313537, \*1 (E.D. Mich. January 30, 2007) (allowing sur-reply brief when there is no prejudice and additional briefing will aid in the decisional process). A sur-reply brief is particularly appropriate when new arguments have been raised in a reply brief. *Dupree v. Cranbrook Ed. Cmty.*, No. 10-12094, 2012 WL 1060082, \*1 fn.

1 (E.D. Mich. March 29, 2012) (granting motion for leave to file a sur-reply to address arguments first raised in a reply brief). The filing of Dealership Plaintiffs' proposed sur-reply will not prejudice Defendants. On the other hand, Dealership Plaintiffs will be prejudiced if they are not permitted to file the proposed sur-reply because Defendants' reply brief introduced new arguments and created misperceptions about the issue of Dealers' production, to which Dealership Plaintiffs have not had an opportunity to respond. Defendants' brief raises a substantive new issue regarding whether Dealership and End-Payor classes can be certified, based on the existence of certain factors. An explanation of what information Dealerships have agreed to produce regarding those factors as well as Dealerships' response as to the roles the described factors will play in the class certification process will aid the Court in deciding whether additional depositions beyond the "one deposition of a named plaintiff" referred to by the Court at the last status conference are necessary. Particularly given the burden that five additional days of depositions for each of the forty-five dealers will place on the Dealership Plaintiffs, Dealerships respectfully request that this Court grant Dealerships leave to file the attached sur-reply.

WHEREFORE, Dealership Plaintiffs respectfully request entry of the proposed order attached as Exhibit 2, which allows Dealership Plaintiffs leave to file the sur-reply attached as Exhibit 1.

Dated: April 13, 2015

Respectfully submitted,

/s/ Jonathan W. Cuneo

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 13, 2015 I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send electronic notices of same to all counsel of record.

/s/ Jonathan W. Cuneo

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